CIV/APN485/99

IN THE HIGH COURT OF LESOTHO

In the matter between

PEETE NKOEBE PEETE **APPLICANT**

AND

M & C HOLDINGS (PTY) LTD (FORMERLY)

M & C CONSTRUCTION (PTY) LTD **RESPONDENT**

JUDGEMENT

Delivered by the Honourable Mrs. Justice K.J. GUNI
On the 4th December, 2001

The applicant in this matter, is the owner of plot number 12284-003, situated at EUROPA, MASERU URBAN AREA, in the district of MASERU. The applicant and the respondent company-represented by Kai FRODE Christensen entered into a sublease agreement on the 4th day of September 1987. In terms

of this sublease agreement the respondent was obliged at its own cost and expense to develop the land on this applicant's plot number 12284-003, by erecting and constructing thereon such office accommodation as it deemed fit and with prior approval of the owner of the plot-the applicant herein. (see clause 4 of the sublease Agreement at page 18 of the record.).

The parties further agreed that the premises so erected would be used solemly for office accommodation. The said office accommodation was to be rented out by this respondent at its sole discretion without the applicant's consent. The subletting of the offices on these premises were to be in such terms and conditions as the respondent deems fit and proper (refer to clause 6 of the sublease at page 18 of the record).

The respondent has sublet the offices in terms of the sublease. The respondent company earns ninety-three thousands, six hundred and fifteen Maloti and thirty-nine lisente (M93,615.39) per moth by way of rentals for the office

accommodation rented out. This was what the respondent received by way of rentals for the moth of January 2000. In terms of the provisions of the ADDENDUM to this sublease agreement the respondent should pay five thousand maloti (M5,000) per month as rent to the sublessor, this applicant. (refer to page 23 of the record - annexure "PNP3").

Round about 1990, the applicant herein asked for a loan from the respondent. After a prolonged period of negotiations and some diplomatic posturing by the respondent's representative, one Mr. Christensen, the applicant was advanced the sum of two hundred thousands maloti (M200, 000.00) by this respondent. In his letter of April 8th 1991, Mr. K.F.Christensen asked this applicant to indicate his consent to M200 000.00 at 28% per annum-covering a period of (9) nine years eight (8) months of rentals. It would appear that the applicant expressed his willingness and desire to accept such terms and conditions, which may follow approval of his application . (See Annexure "ES6" at page 88 of the record).

There must have been a prior verbal discussion of the loan agreement. The applicant seems to have suggested that amongst those terms and conditions which he had not specified, but which he accepts that the respondent may impose, there must be some flexibility which will allow early repayment of the whole sum or part thereof.

It seems that the parties had further agreed that the method of repayment should be the set off against the rentals due to the applicant from the respondent. In his letter of March 8th 1994, Mr. Christensen on behalf of the respondent company spelled out the terms of the parties' agreement of April 8, 1991 which was signed on May 9th, 1991. This applicant was extended "a loan of (M200 000.00) two hundred thousands maloti with interest at the rate of 28% per annum for a period of 116 months". Attached to this letter is a schedule made by Mr. Christensen. In this schedule he has shown the rate and period of repayment. (See page 98 of the record). It is in the common cause that the parties agreed that the rentals due from the

respondent and payable to this applicant, must be used by the respondent in order to reduce the applicant's indebtedness to the respondent company.

The dispute arose between these two parties as regards their relationship in respect of their two agreements. i.e. first the sublease agreement signed on the 4th September 1987 and secondly the loan Agreement signed on 9th May 1991. It is this applicant's case that there are two distinct and separate agreements, each with its own terms. The respondent's case seems to be to the effect that the loan agreement is part and parcel of the sublease agreement. The communication between the two parties was not too good. The applicant instructed his attorneys of record at the time E.H. PHOOFOLO & CO. to address the following inquiry to the respondent company.

RE: SUBLEASE N0.20756

We are the Legal Representative of P.N. Peete, your sub-lessor in plot N0.12284-003. Our client has instructed us to request the following information from your good selves.

1. ***THE BUILDING***

(a) *the full capital expended on the building up to completion.*

(b) *how much of the capital investment has been recovered since the building was occupied to-date.*

(c) *the rental collected thus far from the date of occupation by your tenant's to-date.*

2. *LOAN FUND-M200 000.00*

"How much repayment have you recovered under the loan funds and how much remains due and repayable to-date.

You will realise that as owner of the premises our client is keen to keep in his possession detailed records of his obligations under the sub-lease agreement as well as the loan agreement.

Also we are told that both our client and yourself had verbally agreed initially that there were some irregulations in the capital out-lay on the building and improvements thereon, and that corrections of the same, together with the occupancy position would be confirmed in writing. It is in the implementation of this correct undertaking that we request the above-mentioned information."

To this inquiry the applicant received this reply:-

(1) "We are not in a position to disclose any financial matters pertaining to Christie House, and for that matter no such obligation exists under the sublease.

(2) If your client wishes to pay back the loan we will investigate and recalculate the balance. This is a complicate task requiring computer time and the 3 hours of our accountant's work, which of course would be chargeable. Should you client agree to pay such charges we would be willing to undertake this work.

Your last paragraph is in comprehensible. The capital outlay improvements etc is the responsibility of the sublessee in accordance with the lease agreement."

As the dispute went on, the applicant approached this court and sought the Order of Court in the following terms.

1. (a) "the Rules as to form a period of notice be dispensed with on the grounds of urgency;

(b) the respondent shall not be ordered to collect and pay over to the attorneys T. HLAOLI & CO all the rentals collected monthly from tenants of offices at the building known as Christie House pending the determination of this application and the proceedings in CIV/T/434/99;

(c) *Respondent shall not be restrained from appropriating the rentals paid by tenants of Christie House pending the determination by this Honourable Court of the dispute in this application and CIV/T/434/99.*

(d) *Costs of suit;*

(e) *Further and/or alternative relief;*

(f) *Granting the applicant such further and/or alternative relief.*

3. *That prayers 1 (a) (b) and (c) operate with immediate effect as interim relief."*

The application is opposed. An opposing affidavit deposed to on behalf of the respondent by one EDWARD STUART SYKES was filed on 6th December 1999.

In this application, the applicant insists that the sublease agreement between himself and the respondent company has expired on the 4th September 1992. Since its expiration, the respondent has remained in occupation of the leased property. Without the registered sublease

agreement the respondent has the status of a monthly tenant. According to the applicant this month to month tenancy of the respondent has also been terminated by him. This was done by letter ANNEXURE "PN8" which is date 24th March 1999.

The respondent's case is the denial that the initial sublease Agreement expired and that the respondent failed to renew the same. The respondent's case is not very clear and simple. The applicant was advanced a sum of two hundred thousands maloti (M200 000.00) by the respondent. It seems that the respondent regards this loan as rent paid to the applicant in advance for a period of nine (9) years and eight (8) months. Therefore if the respondent has already paid rent for that period, it must remain in occupation. Or the rent must be refunded with interest at the rate of 28% as agreed. Without making the offer to refund the rent plus interest the applicant cannot claim that the sublease has expired. How the position

taken relates to the renewal of the sublease, it is not clear. Whether or not the applicant's indebtedness to this respondent took away its right to exercise the option granted to it by the sublease agreement to renew the said sublease, it is not spelled out in clear terms on behalf of this respondent.

The two parties in this matter agreed on the duration of their sublease Agreement. Clause 2 (a) (ii) provides that :-

> *"the sublease shall subsist for a period of five (5) years." (b) The sublessee is hereby granted the option to renew the sublease, on the same terms and conditions as are in this contract recorded, for eight (8) further successive terms of five (5) years each.*
>
> *"Provided that the sublessee shall give the sublessor three calendar months written notice prior to the expiration of any existing term of its intention to renew the sublease for a further term".* (My underlining, to highlight the salient points.) The provisions of this clause are ignored as though they are irrelevant. The great deal is being made, of this applicant's indebtedness as the factor which governs the

existance of the sublease.

Now the question to be determined is whether or not the sublease between these two parties still subsists. There are various ways in which leases come to an end. In our present case, the parties themselves fixed the period of expiration of their sublease agreement. (Clause 2 (a) (ii)). The sublease was for a period of five (5) years. Before the expiration of that period of five (5) years, the respondent had an option to renew the sublease for a further period of five (5) years. The respondent did not exercise its option. However it is argued on its behalf that the payment of the rent in advance is the renewal of the sublease. The payment made by the respondent of two hundred thousands maloti (M200 000.00) to the applicant was a loan. It was not an advance payment of rent. The time shown on the schedule was for the period of recovery from the rentals due to the applicant from the respondent. It does not relate to the extension of the terms of the sublease. It

was merely a convenient means of recovery of the loan the parties agreed upon.

There are separate and distinct requirements for the renewal of the sublease for a further period as stipulated in the sublease agreement by the parties. Firstly:- Before the expiration of the current term of the said sublease, the respondent is obliged to give three calendar months written notice of its intention to renew the sublease for a further term. (Clause 2 (b) proviso). It is not alleged or proved on behalf of the respondent that this applicant was given that notice. The sublease agreement between these two parties came into effect upon its signature on the 4th September 1987. The duration of five (5) years lasted up to the 4th September 1992. The letter, - annexure PNP7-written on the 8th April 1999 by the attorneys of record of the respondent to the attorneys of record of the applicant herein, cannot be given a retrospective effect. The sublease, having lapsed due to effluxion of the specified time cannot be extended after it has lapsed.

The sublease agreement is very clear as far as the manner of its renewal is concerned. The Notice of Intention to renew must be given prior to the expiration of the sublease - not after it has expired. Secondly, that three calendar months notice must be given to the lessor - the applicant herein. Thirdly, that notice must be written - not verbal. None of these requirements were fulfilled on behalf of this respondent company.

There are also legal requirements for the continuation of the sublease if the subleasee intended to renew it for a further period of more than three years. The respondent needed the consent of proper authority in writing. Section 24 (2) DEED REGISTRY ACT N0.12 of 1967. This consent the respondent obtained after the sublease had long expired. Therefore it is of no legal significance in respect of the requirements for the renewal since it has already expired.

Every agreement of lease or sublease must be registered in the deeds registry. Section 24 (1) DEED REGISTRY ACT 12 of 1967. Since the sublease agreement between the applicant and respondent expired in September 1992, there is no registered sublease between these two parties. The payment of rent can only entitle the respondent to the status of monthly tenancy. RANER AND BERNSTEIN V ARMITAGE 1919 TPD/WLD 58 particular if the applicant has accepted such monthly payments of rent. Since the sublease agreement has been allowed to lapse, payment of rentals seems to be the only ground on which the respondent may presently rely on for its continued occupation of the leased property. The respondent pays monthly rentals. Now that it is entitled to be treated as a monthly tenant, the one-month notice for the termination of that month to month tenancy, is required. RANER AND BERNSTEIN V ARMITAGE (supra). This should be coupled with the method of termination elected by the parties in terms of their agreement. This should bring into effect provisions of clause 10 of the said sublease agreement.

I was very reluctant to deal with this matter in an application from in motion proceedings. At the time when the parties appeared to join issues on whether or not the sublease still subsists it appeared that there was a need to have a trial and parties to be given an opportunity to proved their case by leading oral evidence and by production of necessary documents to prove registration of the said sublease if it still subsists and registered in terms of the law.

The applicant had already attached to this application the summons issued out of this court. I made an order consolidating this application and that action with the intention of proceeding with the trial in a normal way.

This applicant had obtained ex-parte an order of this court in those terms shown earlier on. The hearing on the 15th December 1999 was for the purpose of confirming or discharging that Rule nisi. Because of the alleged urgency of

the matter I was not confortable to deal with it in the form of an application in the face of the dispute with regard to the existance or non-existance of the sublease. The persual of the papers filed of record convinced me that the matter could be best resolved once and for all if it proceeded as a trial. The applicant had obtained the Rule Nisi pending the finalisation of both this application and that action. The prayers in both this application and the summons are the same. With the persistance of the counsel for the parties that the matter is urgent and that I should give them dates for the hearing of that action, I ordered them to go and seek allocation of the trial dates from the registrar. I indicated to them to select the dates which will allow them to complete the pleadings in order that the trial commences without delays.

They went and later returned into court and informed me that they obtained 18th February 2000 and 25th February 2000 for the matter to proceed as a trial. Before these trial dates the two parties appeared in court disrupting the proceedings in

progress therein to the annoyance of all the members of the court involved in the criminal trial which was in progress. The respondent had filed another process called application for leave to anticipate the rule.

For the month of January 2000, the respondent had received rentals from the tenants of the property sublet, in the amount of (M93 615.39) ninety-three thousand six hundred and fifteen maloti thirty nine lisente.

In terms of the sublease agreement the respondent is entitled at its sole discretion and without the sublessor's consent to further sublet the premises or any part thereof upon such terms and conditions as it may deem fit and proper (refer to clause 6 of the sublease agreement).

On behalf of the respondent company one EDWARD STUART SYKES deposed to the supporting affidavit for the application for leave to anticipate the Rule Nisi. This

application was strange. Although it purports to seek leave to anticipate the rule Nisi issued on the 24th November 1999 it in fact endeavoured to show that the said Rule Nisi had expired. This application was opposed and the applicant in the main application had filed an opposing affidavit. The argument between the parties was whether or not there is a Rule Nisi. The applicant's case was that there is a rule nisi which this respondent is in contempt of by failing or refusing to pay the rentals into the applicant's attorney's account.

Apparently, subsequent to the order which converted the motion proceedings into the trial and consolidated the two actions, the applicant's attorney continued to extend that rule Nisi he obtained ex-parte on 22nd November 1999. Once the motion proceedings had been converted into trial, there was no rule Nisi to be continuously extended. It was this anormally which prompted the respondent to approach this court once again in this unconventional fashion of application for leave to anticipate the Rule Nisi that was regarded by them as having

expired. When the motion proceedings are turned into a trial action, there is no rule Nisi. The process of conversion from application proceedings to trial proceedings destroys or kills the rule Nisi if no specific order of the discharge of the same is not made. The process of conversion itself did away with the rule Nisi.

When the motion proceedings were converted into trial proceedings, the Pandora's box was seeminly opened. All sorts of strange things came out. After the filing by the respondent of the so-called application to anticipate the Rule Nisi which throughout the supporting affidavit by EDWARD STUART SYKE enormous effort was being made to convince the court that there is no rule Nisi in existance, more and further processes were filed with the court; such as an application for contempt of the court order. EDWARD STUART SYKE goes on to show that even though the respondent is entitled to sublet the premises at such terms and conditions as it deems fit, respondent has sublet the said premises at such terms and conditions that it cannot mange or afford to maintain the

premises from the proceeds or rentals. Respondent has sublet the said premises at such terms and conditions that in January 2000, the sum well over ninety-three thousands was received as rentals. The exact figure of the rentals received or expected to be received for the month of January is ninety three thousands, six hundred and fifteen maloti and thirty nine lisente. (M93 615.39). But from this sum of income the respondent, as it is claimed, is unable to maintain the lift in that building. This is strange.

The deponent of this supporting affidavit in anticipation of the rule Nisi claims that the respondent company's expenditure far exceeds its income. The shortfall between the income and expenditure is always borne by the director or shareholders Mr. K.F. Christensen. That shortfall as at December 1999 stood at M3 450 894.41 and continues to attract interest at undisclosed rate. An amount of M93 614.39 which the respondent receives by way of rentals which have been so determined by the persons managing it, is not even enough to

pay the expenses. Who is to be faulted for running the respondent's business in that fashion? Certainly not this applicant. If it is mismanagement of the respondent company, that mismanagement cannot be relied on against the specific terms of the agreement between the parties.

The claim is made that the respondent cannot afford to pay for the running of the lift, and to supply the sub-tenants with water and electricity. No attempt is made to show and prove these claimed costs. There should be at least copies of the subleases, which show that it is the landlord-respondent who pays for the electricity and water for those offices sublet by it. The whole premises is rented out as office accommodation. There should be some kind of prove e.g. copy of a cheque or receipt for payment by respondent for the water & electricity and the operation and servicing of the lift. The respondent is in possession of the leases for subletting. Why is there no single copy of the sublease attached ? There is no proof of any of the expenses claimed. I cannot accept just a bare allegation that

K.F. Christensen has loaned M3 450 894.41 to pay for water, electricity and the operation of a lift without any proof.

There being no rule Nisi to anticipate the failure to prove the alleged expenses at this stage has no effect. The persistance by the applicant that there is a rule Nisi even after the motion proceedings have been converted into trial proceedings also has no basis nor support. The filing of an application for contempt of the none existing rule Nisi is also an exercise in futility. The whole argument which was pursued under that guice of application for leave to anticipate the rule, long after the hearing of the same, was an after thought. The application had to be determined after the consideration of the papers filed for the purpose. This separate application for leave to anticipate the rule Nisi which had been dealt with, was irrelevant and improper.

The application for contempt of the court order obtained ex-parte, in terms of the application which has formed part of

the trial proceedings, also falls in that same category of irrelevant and improper process. Too much time was being wasted for dealing with this irrelevant processes. My patience was stretched well beyond stress limits by my fishing and flumblying in too much rubbish and trying to make sense of it all. The two applications i.e. application for leave to anticipate a rule Nisi long after the Rule has been dealt with and disposed of and the application for contempt of the same, were ill conceived. Both these applications are dismissed. Parties bear their own costs for each one of them. The main application, which is the start of these chains of applications is in effect swallowed up by a trial action. There is no determination of that as an application proceedings. The costs are still in the course of the action.

In all these matters contained in this record, the only matter which this court must decide, following the order that the application proceedings are consolidated with the action proceedings, is the matter of exception to the summons.

In the declaration, the plaintiff-the sublessor or landlord, alleges that the sublease agreement between them has come to an end. When that sublease comes to an end, the parties have certain obligations to each other in terms of that sublease agreement. These obligations are found in clause 10 of the sublease Agreement.

> Clause 10 (b) provides:- "*The sublessor will be obliged to compensate the sublessee for all other buildings or improvements of a permanent or immovable nature then existing on the land in an amount equivalent to the value thereof as determined by a sworn Appraiser at the date of termination*".

The sublease agreement has terminated as alleged by the plaintiff through effluxion of time. Clause 10 comes into effect. It is properly invoked now that the sublessor wants to take the advantage of the termination of the sublease through effluxion of time.

The plaintiff is not asking the defendant to vacate the leased property. The order sought is to restrain the defendant

from collecting rentals from tenants after declaring that the sublease agreement had come to an end. The effect of the court order sought is eviction of the defendant from the leased premises unless the respondent is employed to collect rentals from the subtenants on behalf of the applicant. This is not the position. In accordance with the provisions of clause 10 of the sublease, the obligations of the parties are reciprocal Wynn's car Care Products (Pty) LTD V First NATIONAL INDUSTRIAL BANK LTD 1991 (2) SA 754 AT 757f. This being the case, neither party should be entitle to enforce his own right under the contract, unless he has performed or is ready to perform his own obligations, Nesci V Meyer 1982 (3) AS 498 a at 513F.

The defendant, relying on the proper construction of clause 10 of the sublease agreement, raises the defence that the plaintiff has not made an offer to compensate it in terms of that clause or at all. The termination of the sublease through the effluxion of time in terms of the provisions of clause 10 (b) should come along or together with compensation. Hence the

use of the words "upon termination of the sublease through effluxion of time --- (b) sublessor will be obliged to compensate the sublessee". The termination and compensation should happen simultenously.

It is clear from this expression that the obligations of the parties are not only reciprocal but that they should be performed simulteneously. In these circumstances an exception to the summons was well taken and must succeed. The plaintiff's action fails. It is dismissed with costs.

K.J. GUNI
JUDGE

For defendant's Harley & Morris
For applicant : Messrs T.Hlaoli & Co.